

ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In re:

Request of Cellular Communications of
Puerto Rico, Inc. to Hold an Auction
To License Cellular RSA No. 727A,
Ceiba, Puerto Rico

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RM-8897

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Federal Communications Commission
Office of Secretary

To: The Commission

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REPLY COMMENTS OF APPLICANTS AGAINST
LOTTERY ABUSE

Eliot J. Greenwald
Stephen J. Berman

FISHER WAYLAND COOPER LEADER
& ZARAGOZA
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

Its Counsel

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Summary

Applicants Against Lottery Abuse (“AALA”) once again urges the Commission to reject the Petition filed by Cellular Communications of Puerto Rico, Inc. (“CCPR”) and to declare that it will not use auctions to assign either the license for cellular rural service area (“RSA”) No. 727A, Ceiba, Puerto Rico, or any other RSA license for which applications were received prior to July 26, 1993.

Of the sixteen parties who filed comments in response to CCPR’s petition, all but two strongly oppose the use of auctions to assign RSA licenses. These commenters generally believe that the Commission lacks authority to auction these licenses, and that relotteries are the quicker and fairer alternative. Many also argue that CCPR’s unlawful ex parte contacts led to the current proceeding, and that CCPR should be sanctioned for this conduct.

Only two parties, Bell Atlantic NYNEX Mobile and Western Wireless Corporation, support CCPR’s petition. These parties believe that the Commission has the power to subject these RSA licenses to competitive bidding. As AALA has previously made clear, however, the Commission lacks this statutory authority. According to Supreme Court precedent, the Commission can retroactively apply its auction authority only if Congress clearly stated that such application was intended. No such indication is evident in the statute or in the legislative history. In fact, Congress expressly prohibited auctions in some retroactive contexts.

BANM and WWC also contend that auctions would be more equitable than relotteries. In doing so, they repeat many of the arguments made by CCPR in its petition. They claim that the original applicants already had their chance in a lottery and “lost.” As AALA has stated previously, however, where an initial “winner” is ultimately deemed ineligible, the initial lottery is properly viewed as having never occurred at all, because a lottery was not held among eligible

applicants only. These parties also assert that the passage of eight years since the original filing somehow diminishes the original RSA applicants' right to the promised lotteries. This position is clearly illogical, as the longer a party experiences unfair treatment, the more imperative an appropriate remedy becomes. Moreover, it is not the lottery mechanism which is the cause of this delay, but the Commission's sluggish administrative processes.

BANM and WWC also argue that RSA licenses would be assigned more quickly through auctions. This claim is clearly incorrect, as the Commission will be able to conduct numerous relotteries in short order at the end of this proceeding. In contrast, auctions would require substantial administrative effort, and would lead to years of litigation. In the meantime, thousands of rural consumers would be subject to the inferior service provided by holders of Interim Operating Authority. Moreover, given the merits of this issue and the egregious ex parte conduct of CCPR, a decision to auction outstanding RSA licenses would almost certainly be reversed by the U.S. Court of Appeals. Entering a crucial period of change in telecommunications, the Commission can ill afford to have its legal judgment and authority discredited in this fashion. Accordingly, the Commission should reject the auction alternative and move quickly to hold RSA relotteries.

Finally, WWC, CCPR, and other Interim Operating Authority ("IOA") providers must be reminded that they are barred from participating in any assignment procedure for permanent operating authority. The IOA providers were required to dismiss their pending applications before they received their IOAs, and those whose applications have been pending for eight years are protected from new competing applications.

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Ceiba, Puerto Rico)

To: The Commission

REPLY COMMENTS OF APPLICANTS AGAINST LOTTERY ABUSE

Applicants Against Lottery Abuse ("AALA"), by their attorneys, hereby submit their reply comments on the Petition for Declaratory Ruling, or, in the Alternative, for Rulemaking (the "Petition"), filed by Cellular Communications of Puerto Rico, Inc. ("CCPR") with the Commission on September 9, 1996. AALA again urges the Commission to reject CCPR's request that auctions be used to assign either the license for cellular rural service area ("RSA") No. 727A, Ceiba, Puerto Rico, or any other RSA license for which applications were received prior to July 26, 1993.

Of the sixteen parties who filed comments in response to CCPR's petition, all but two strongly oppose the use of auctions to assign RSA licenses. In general, most of these parties argue that the Commission lacks authority to hold auctions here, that a decision to auction these licenses would be extremely unfair to the original RSA applicants, and that relotteries would be a more expeditious means of assigning these licenses. In addition, many commenters contend that this rulemaking is the product of unlawful ex parte contacts by CCPR, and that the Commission

must recognize the flagrant illegality of this egregious conduct. Only two parties -- Bell Atlantic NYNEX Mobile, Inc. ("BANM") and Western Wireless Corporation ("WWC") -- support CCPR's request for auctions. AALA now urges the Commission to reject their arguments and summarily dismiss CCPR's petition. In doing so, the Commission should make clear that, in the future, it will use only lotteries to assign cellular licenses for which applications were filed prior to Congress' passage of auction legislation in 1993.

Discussion

I. The Commission Lacks Statutory Authority to Conduct Auctions for Outstanding RSA Licenses

Both WWC and BANM argue that the 1993 Budget Act authorizes the Commission to assign outstanding RSA licenses through auctions.^{1/} This argument must be rejected, as the Commission is legally obligated to conduct a lottery for any cellular license for which applications were filed prior to July 26, 1996.

In order to hold the auctions which BANM and WWC favor, the Commission would have to apply a legislative rulemaking retroactively.^{2/} As explained in AALA's initial comments, the Supreme Court most recently in Landgraf v. USI Film Products made clear that statutory grants of rulemaking authority do not encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.^{3/} The Budget Act does not speak with sufficient clarity to justify retroactive use of auctions for applications already on file with the

^{1/} BANM Comm. at 2-3; WWC Comm. at 3-4.

^{2/} Legislative rulemaking occurs when agency rules are promulgated at Congress' behest, as compared to an administrative rulemaking (agency promulgating rules on its own with no statutory mandate) or adjudicative rulemaking (rules that arise out of an adjudication).

^{3/} 114 S. Ct. 1483 (1994).

FCC. On the contrary, Congress expressly granted the FCC permission to conduct lotteries -- not auctions -- for applications on file prior to July 26, 1993.^{4/} Furthermore, in discussing the abandonment of lotteries, the final Conference Report on this legislation voiced a concern over specific retroactive applications of the auctions by expressly allowing the FCC to maintain lotteries for all applications filed prior to July 26, 1993, mentioning "the nine Interactive Video Data Service markets for which applications have already been accepted, and several other licenses" as examples of when lotteries are to be maintained.^{5/} Consistent with the interplay of this legislative history, Section 6002(a) of the 1993 Budget Act, and the above-cited Supreme Court precedent, the Commission has chosen to conduct lotteries both for IVDS licenses and cellular licenses for "unserved" areas where applications for those licenses were on file before July 26, 1993.^{6/} Similarly, the Commission is required to conduct lotteries for all RSA cellular licenses for which applications were on file prior to the Budget Act's passage.

^{4/} Budget Act Special Rule § 6002(e)(2), 107 Stat. at 397.

^{5/} H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1187 (emphasis added). The Conference Report's specific reference to IVDS licenses does not reflect any intention to limit the application of this rule to that context; it merely evidences the lobbying efforts of potential IVDS service providers.

^{6/} Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 7387 (1994) ("Unserved Areas Order"). The absence of any reference to RSA licenses in this order is not evidence that the Commission intended to limit the application of its analysis. Most likely, the Commission simply assumed that it would hold relotteries for any outstanding RSA licenses, as this had been established Commission practice for several years. See, e.g., Public Notice, Report No. CL-92-76, (released April 9, 1992) (announcing the results of relotteries for Unlicensed Markets held on April 8, 1992); Public Notice, Mimeo No. 302121 (July 20, 1989) (stating that in the event the application selected in cellular lotteries for North Carolina and Puerto Rico could not be granted, another lottery would be held for those markets and another application would be selected from the remaining applications).

BANM contends that the Commission's 1984 Cellular Lottery Order^{7/} and the D.C. Circuit's opinion in Maxcell Telecom Plus, Inc. v. FCC^{8/} support the argument that the Commission can retroactively change its procedures for assigning cellular licenses. The different factual scenario in Maxcell, however, renders this decision inapposite to the RSA context. As the Maxcell court noted, the applicants who complained of the Commission's decision were all on notice of the possibility of this change prior to filing their applications.^{9/} In contrast, the applications for RSA licenses were filed in 1988 and 1989, a couple of years before auctions began receiving serious legislative consideration. Thus, these RSA applicants in no way could have foreseen the enactment of the auction legislation or have anticipated that their licenses might someday be subject to competitive bidding.

II. Lotteries Are a More Equitable Means of Assigning Outstanding RSA Licenses

BANM and WCC contend not only that the Commission has the authority to use auctions to assign outstanding RSA licenses, but also that auctions of RSA licenses would be more equitable than lotteries. First, echoing CCPR's claim, they both assert that the original RSA lottery applicants have already received what they applied for, an opportunity to participate in a lottery, and that these applicants are entitled to no more than that.^{10/} As explained in AALA's initial comments, the Commission must reject this view. Each original applicant submitted its

^{7/} Amendment of the Commissioner's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings ("Cellular Lottery Order"), 98 FCC 2d 175 (1984); recon., 101 FCC 2d 577 (1985).

^{8/} 815 F.2d 1551 (D.C. Cir. 1987).

^{9/} 815 F.2d at 1555.

^{10/} BANM Comm. at 10, n.15; WWC Comm. at 7.

filing fees and participated in the Commission's procedures with the expectation that its lottery would be conducted fairly, giving each applicant an equal chance to be selected as the licensee. The Commission later determined in each case that the actions of some applicants precluded a fair result, and disqualified each lottery winner. In light of this result, it cannot be said that the original applicants "lost" these initial lotteries. The lottery "winners" were not even qualified to participate, and the initial lotteries are therefore more properly viewed as having never occurred at all. The original eligible applicants should now be afforded valid lotteries, involving only qualified, eligible participants.

BANM and WWC also agree with CCPR that, in light of the number of applications received for each RSA license, the original lottery applicants had no reasonable expectation of success.^{11/} As a result, they say, it would be equitable now to subject this license to competitive bidding. This argument is irrelevant, and must be rejected by the Commission. While the original RSA applicants were undoubtedly aware of the potential downside of random selection prior to filing, they still chose to devote the necessary resources to what was assumed would be fair and valid lotteries. After eight years, the Commission must finally fulfill this obligation.^{12/}

Both WWC and BANM also argue that the passage of eight years somehow diminishes the original RSA applicants' right to the promised lotteries.^{13/} WWC asserts that the Commission should alleviate the "staleness" of the RSA licensing process by turning to the

^{11/} BANM Comm. at 9; WWC Comm. at 6.

^{12/} Public Notice, Mimeo No. 63896 (July 12, 1996).

^{13/} BANM Comm. at 9; WWC Comm. at 5.

auction remedy.^{14/} This position is entirely illogical. The longer a party experiences unfair treatment, the more imperative an appropriate remedy becomes. Thus, despite WWC's claim to the contrary, the original RSA applicants' eight year wait for justice weighs more heavily in favor of lotteries here than did applicants' three year wait in the unserved areas context. The Commission cannot change its rules to the detriment of those who filed applications in conformance with the rules eight years ago,^{15/} and should expeditiously proceed with the relotteries that these applicants deserve.

BANM has the further audacity to attribute the holdup in RSA licensing to the "inherent flaws" of the lottery process.^{16/} BANM and any other party who has followed this process know that this delay has nothing to do with the relative efficiency of the lottery mechanism, and everything to do with the inertia of the Commission's internal administrative processes -- clearly, at any time during the past three years the Commission could have held relotteries for the RSA markets specified in the Commission's July 12 Lottery Notice. It would be a perversion of justice to torpedo the rights of original RSA applicants on the basis of a delay for which the Commission itself is responsible.

Thus, despite BANM's and WWC's best efforts, it is clear that relotteries would be a far fairer method of assigning outstanding RSA licenses. As explained in AALA's initial comments, these RSA licenses remain available for assignment only because of the efforts of original RSA applicants. In successfully challenging the initial lottery results and seeking the disqualification

^{14/} WWC Comm. at 5.

^{15/} See, e.g., McElroy Electronics Corp. v. FCC, 3 CR 484, 490-91 (D.C. Cir. 1996) ("McElroy II").

^{16/} BANM Comm. at 11.

of selectees who violated the Commission's rules, these applicants fully relied on the Commission's established policy of holding relotteries for affected licenses. In particular, the members of AALA and other applicant coalitions committed over two million dollars in legal effort to this process, under the reasonable assumption that any licenses that became available would be assigned through relotteries.

WWC desperate tries to find support is the Commission's Ninth Report and Order in the Competitive Bidding Proceeding. There, the Commission stated the following:

In markets where a cellular unserved area license was granted under the lottery process, and the license was canceled for failure to construct or was later revoked, the unserved area reverts to the Commission for licensing. In these instances, we will accept applications for the unserved area under the new rules adopted herein and select the licensee by auction.^{17/}

WWC states that the situation described above is analogous to that in the RSA markets where the tentative lottery selectee was dismissed, including the six scheduled for relottery in September.^{18/} This assessment is blatantly incorrect. Where a lottery winner's license expires for non-construction, there is no adverse finding concerning that licensee's lottery eligibility. Under those circumstances, the lottery losers lost fairly. In contrast, where a tentative selectee is disqualified, the Commission concludes that the tentative selectee was not even qualified to participate in the initial lottery. Hence, the lottery losers never had an opportunity to participate in a fair lottery, and a relottery is the more equitable alternative.

^{17/} Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Ninth Report and Order, PP Docket No. 93-253, FCC 96-253, para. 4 (November 7, 1996).

^{18/} WWC Comments at 7.

III. The RSA Licenses Would Be Licensed More Efficiently Through Lotteries

Both WWC and BANM repeatedly state that RSA licenses would be more expeditiously assigned through the use of actions.^{19/} This claim is obviously false. Were the Commission to end this rulemaking proceeding today, it would be able to conduct numerous relotteries in short order. After all, in September, before CCPR engaged in its unlawful ex parte communications with Commission staff, the Commission was set to proceed with lotteries for six of the outstanding RSAs. In contrast, should the Commission choose to auction these RSA licenses, it would be some time before any party receives permanent authorization. Auctions would require a substantial administrative effort, with the Commission having to seek new showings from existing applicants and to refund original applicants' application fees where necessary. In addition, as discussed further below, the original applicants would certainly mount an aggressive legal challenge to this decision, and such litigation would likely take several years, putting the auction results in question for that time period.

Moreover, the further delay caused by auctions would not be without significant consequence. While customers in many RSAs would receive cellular service during this period, such service would be from carriers acting under Interim Operating Authority ("IOA"). As both BANM and WWC appear to acknowledge, IOA carriers have little incentive to provide service equivalent in quality to that offered by permanent licensees.^{20/} As a result, a decision to use auctions would subject thousands of rural consumers to inferior service for several more years.

Thus, despite BANM's and WWC's assertions to the contrary, the RSA matter involves the same considerations of equity and administrative efficiency that convinced the Commission

^{19/} BANM Comm. at 10-11; WCC Comm. at 5.

^{20/} BANM Comm. at 11; WWC Comm. at 5.

in 1993 to reject auctions in the unserved areas context. The Commission should summarily deny CCPR's petition, and quickly proceed with relotteries for all applicable RSA licenses.

IV. A Decision to Assign Outstanding RSA Licenses Through Auctions Would In All Likelihood Be Reversed by the U.S. Court of Appeals

As mentioned above, the original applicants would mount a legal challenge to any decision to auction RSA cellular licenses. The Commission must recognize now, before it is too late, that these applicants would in all likelihood prevail in such litigation. Not only do the above-described merits weigh heavily in applicants' favor, the Court of Appeals also would surely give special consideration to the fact that this policy reversal resulted from CCPR's unlawful ex parte contacts with the Commission staff during the pendency of this restricted proceeding. As indicated in an important early case on ex parte contacts, Home Box Office, Inc. v. F.C.C., the D.C. Circuit Court views such illegal conduct with grave seriousness:

Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those "in the know" is intolerable. . . .

Equally important is the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decision making on the merits which undergirds all of our administrative law.^{21/}

A recent case further demonstrates this court's lack of tolerance for illegal ex parte communications. In Press Broadcasting Company, Inc.,^{22/} a representative of an applicant seeking to reinstate its expired broadcast construction permit met with the Chief of the Mass Media Bureau in violation of the Commission's ex parte rules. While the Commission declined

^{21/} 567 F.2d 9, 54, 56 (1977).

^{22/} 59 F.3d 1365 (D.C. Cir. 1995).

to disqualify or even sanction the applicant based on its view that the applicant plausibly believed that the communications were not violative, the D.C. Circuit Court found that the applicant's belief was not reasonable, given that it had received several warnings from the Commission concerning the restricted nature of that proceeding. The court remanded the matter and asked the Commission to consider whether the applicant's prohibited *ex parte* contacts rendered it unqualified from a character standpoint.^{23/}

The illegality of CCPR's conduct only increases the likelihood of reversal by the D.C. Circuit Court. There is no more egregious form of unlawful *ex parte* conduct than secretly urging the Commission's high level staff to delay action on or dismiss other parties' pending applications. The Commission must understand this reality, and recognize also that during this crucial period of change in telecommunications, the Commission can ill afford to have its legal judgment and authority further discredited. Accordingly, the Commission should reject the auction temptation and move quickly to hold RSA relotteries.

V. If the Commission Does Implement Auctions, WWC and Other Holders of Interim Operating Authority Must Be Excluded from This Bidding

WWC openly states what is implicit in CCPR's petition, that IOA providers should be eligible to participate in a competitive bidding procedure.^{24/} WWC must be reminded that IOA holders are barred from participating in any assignment process for permanent operating authority. As explained in AALA's initial comments, to be eligible for IOA, applicants must

^{23/} See also Jacksonville Broadcasting Corp., 348 F.2d 75 (D.C. Cir. 1965) (upheld the disqualification of a broadcast applicant based on its prohibited *ex parte* communication to Commission decision-makers in a contested proceeding).

^{24/} WWC Comments at 5-6.

affirmatively represent to the Commission that they are not applicants for the permanent license in that market. The Commission cannot now disregard these representations as mere formalities, as this IOA holder exclusion is supported by the fundamental Commission policy against providing an applicant with a substantial competitive advantage in the assignment process.^{25/}

The rationale is at least as applicable to the auction process as to the comparative hearing and lottery processes. An auction participant with an IOA would have a distinct bidding advantage over those without any IOAs because the participant with an IOA has already paid for the construction of at least part of the system. The bidders without the IOA therefore will have higher construction costs, and the bidder with the IOA has a bidding incentive not to lose the construction investment that it has already made. Therefore, an auction participant with an IOA has the automatic ability to bid higher than those without the IOA.

Lastly, parties such as Western and CCPR, who have IOAs in these markets, do not currently have pending applications in the markets that they seek to obtain. They would be barred from filing applications to compete with those who already have applications on file for these markets, even if there were to be an auction. As the Court of Appeals for the District of Columbia Circuit taught the Commission in McElroy II, note 11, supra, “as against latecomers, timely filers who have diligently complied with the Commission’s requirements have an equitable interest in enforcement of the cut-off rules.”^{26/}

^{25/} See, e.g., La Star Cellular Telephone v. FCC, 899 F.2d 1233, 67 RR 2d 808 (D.C. Cir. 1990)

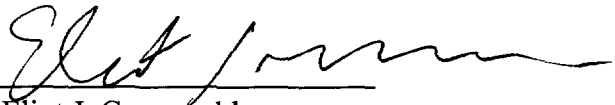
^{26/} 86 F.3d at 257.

Conclusion

Accordingly, Applicants Against Lottery Abuse again respectfully urges the Commission to speedily reject CCPR's petition and expeditiously conduct lotteries for the RSA licenses identified in its July 12 Lottery Notice.

Respectfully submitted,

APPLICANTS AGAINST LOTTERY ABUSE

By: 
Eliot J. Greenwald
Stephen J. Berman
Its Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

Dated: December 10, 1996

CERTIFICATE OF SERVICE

I, Elinor W. McCormick, a secretary to the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., hereby certify that on this 10th day of December 1996, I served a true copy of the foregoing **"REPLY COMMENTS OF APPLICANTS AGAINST LOTTERY ABUSE"** by first class United States Mail, postage prepaid, upon the following:

*Eric J. Bash
Legal Branch
Wireless Telecommunications Bureau
Commercial Wireless Division
2025 M Street, N.W.
Room 7130
Washington, D.C. 20554

*International Transcription Service
2100 M Street, N.W.
Washington, D.C. 20554

Louis Gurman, Esquire
Kimberly D. Wheeler
Gurman, Blask & Freedman, Chartered
1400 16th Street, N.W., Suite 500
Washington, D.C. 20036
Counsel for RSA Applicants

Darsh Aggarwal
8 Morris Road
Irvine, California 92620

Caressa D. Bennet
Anne E. Linton
Bennet & Bennet, PLLC
1019 19th Street, N.W.
Suite 500
Washington, D.C. 20036
Counsel for TME Cellular Partners

Michael F. Morrone
Tashir J. Lee
Keller and Heckman, L.L.P.
1001 G Street, N.W.
Suite 500 - W
Washington, D.C. 20001
Counsel for Moving Phones Partnership,
L.P. and Futurewave General Partners,
L.P.

Richard L. Brown
David J. Kaufman
Scott C. Cinnamon
Brown Nietert & Kaufman, Chtd.
1920 North Street, N.W.
Suite 660
Washington, D.C. 20036
Counsel for RSA Operators Group

Lawrence Roberts
Roberts & Eckard, P.C.
1150 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
Counsel for Price Communications
Cellular, Inc.

Peter M. Connolly
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Telephone and Data
Systems, Inc.

***Hand Delivery**

Richard L. Vega, Jr., President
The Richard L. Vega Group, Inc.
1245 West Fairbanks Avenue, Suite 380
Winter Park, Florida 32789-4878

Donald J. Evans
Evans & Sill, P.C.
1627 Eye Street, N.W., #810
Washington, D.C. 20006
Counsel for Miller Communications,
Inc. and Skywave Communications
Partners

Carla Levesque
Managing Partner
61 Caribe Way
Vero Beach, FL 23963
Counsel for Great Western Cellular
Partners

William L. Fishman
Jane B. Maxwell
Sullivan & Worcester, L.L.P.
1025 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
Counsel for JMC Enterprises, Inc., SDK
Enterprises, Donald J. Kunkle, and
Formula I Cellular

John T. Scott, III
Crowell & Moring, L.L.P.
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Bell Atlantic Nynex Mobile,
Inc.

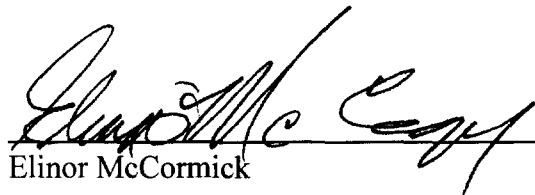
Jon W. Scheidker
Vice President
Terradyne, Ltd.
9914 Northwest 45 Highway
Kansas City, Missouri 64152

Carl W. Northrop
E. Ashton Johnston
Paul, Hastings, Janofsky & Walker, L.L.P.
1299 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20554
Counsel for Thomas Domencich and The
Committee For a Fair Lottery

Christopher R. Johnson
Manager, Regulatory Affairs
2201 NW Sammamish Road, Suite 100
Issaquah, WA 98027
Counsel for Western Wireless
Corporation

Stephen Kaffee
Law Offices of Stephen Kaffee, P.C.
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
Counsel for Crystal Communications
Systems

Sara E. Seidman
Mintz Levin Cohn Ferris Glovsky
& Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004-2608


Elinor McCormick

***Hand Delivery**